JD–60-21
Miami, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

LIMOUSINE OF SOUTH FLORIDA, INC.
d/b/a TRANSPORTATION AMERICA,

and Case No. 12-CA-257039

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 769

Marinelly Maldanado, Esq., for the General Counsel.
Michael Pancier, Esq., for the Respondent.

DECISION

Statement of the Case

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried, by agreement of the parties, using Zoom technology from January 25 –27, 2021. The International Brotherhood of Teamsters, Local 769 (the Charging Party/Union) filed the initial charge in the case on February 26, 2020, and its first amended charge on April 21.[1] On April 23, the Union filed a second amended charge. The Regional Director for Region 15 of the National Labor Relations Board (NLRB/the Board) issued the complaint and notice of hearing on May 31. The Regional Director for Region 15 of the NLRB issued the order and notice of hearing on July 20. Limousine of South Florida, Inc. d/b/a Transportation America (Respondent or LSF) filed a timely answer to complaint denying all material allegations in the complaint and asserting several affirmative defenses.

The complaint alleges that Respondent violated the National Labor Relations Act (NLRA/the Act) when (1) since on or about February 26, Respondent changed the established past practice between Respondent and the Union by requiring union representatives to provide advance notice to Respondent before visiting Respondent's 3737 NW 43" Street facility for the purpose of administering the collective-bargaining agreement between Respondent and the Union; and (2) on or about February 26, Respondent denied a Union representative access, including by calling police officers to its 3737 NW 43" Street facility to force the union representative to leave its premises. The subject actions constitute Respondent's failure and refusal to bargain collectively and in good faith with the exclusive collective-bargaining

[1] All dates are in 2020, unless otherwise indicated.

representative of its employees, in violation of Section 8(a)(1) and (5) of the Act. (GC Exhs. 1(a)—1(ee).)[2]

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following[3]

Findings of Fact

I. Jurisdiction

Respondent, a corporation with an office and place of business at 3737 NW 43rd Street,[4] Miami, Florida, herein called the 3737 facility, and has been engaged in the intrastate transportation of passengers and the operation of public trolley bus transit system for certain municipalities in South Florida.[5] During the past 12-months, Respondent in conducting its business operations, purchased and received goods valued in excess of $50,000 at its facilities in the State of Florida directly from points outside the State of Florida and from other enterprises located within the State of Florida, each of which other enterprises had received the goods directly from points outside the State of Florida. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Overview of Respondent's Operation

Respondent is engaged in the intrastate transport of passengers and the operation of public trolley and bus transit for several municipalities in Florida, including Bay Harbor Island, Miami, Doral, Miami Beach, Miami Gardens, and Miami-Dade County. Ray Gonzalez (Ray G.) and Rene Gonzalez (Rene G.) are the owners of LSF. It operates 24 hours a day, 7 days a week. In 2013, Respondent merged with and began doing business as Transportation America. Respondent's corporate representative, Robert Beers (Beers), oversees the overall operations of LSF. He has worked for Transportation America for about 11 years. Since 2019, Jose Millan (Millan) has been the general manager and reports to Beers. He works with Beers to ensure that the overall operation of LSF runs smoothly. Prior to his most recent position, Millan was the

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R Br." for Respondent's brief.

[3] My findings and conclusions are not based solely on citations I have highlighted in this decision, but rather on my review and consideration of the entire evidence of record in this case.

[4] Respondent's primary office and principal place of business is located at 2766 NW 62nd Street, Miami, Florida.

[5] Throughout the trial, the parties also referred to the Respondent's 3737 facility as the Hialeah facility.

Respondent's operations manager and reported to then General Manager Juan Fraga (Fraga). Millan has been employed with the Respondent for slightly more than 2 years. In his role, Millan, among other responsibilities, monitors drivers and ensures routes are operated timely. Either unilaterally or based on a recommendation from a supervisor, Millan makes the ultimate decision on employee disciplines, terminations, and hires. Supervisors' reports about problems with the operations are sent to him to resolve. The assistant general manager is Victoria Piero (Piero); and Cecilia Cruz (Cruz) is the administration manager in human resources (HR). Currently, Raul Alvarez (Alvarez) is the safety manager. Since October or November 2017, Zev Naiditch (Naiditch) has been the Respondent's corporate union representative and general manager of the paratransit division. There is also a client services department that monitors complaints from cities that contract with Respondent and those reports are also sent to Millan for resolution.

Terry Dorch (Dorch) is the manager of driver and road supervisor/operations lead. She worked as a dispatcher for 5 years before being promoted to lead dispatcher in 2019. As lead dispatcher, Dorch worked from 5 a.m. to 2 p.m., Monday through Friday and oversaw three dispatchers. In this role, Dorch did not have authority to hire dispatchers, transfer or assign dispatchers, suspend or discipline dispatchers, lay-off or discharge dispatchers, recall dispatchers, reward dispatchers, assign overtime for dispatchers, or evaluate dispatchers' work performance. Likewise, Dorch could not take any of the aforementioned actions against drivers. Millan elicited her opinion, however, on whether a candidate for employment as a dispatcher would be a good hire. He also asked for her input on dispatcher suspensions, work assignments, scheduling to ensure coverage, and granting leave requests. During the period she was a lead dispatcher, there was only one additional lead dispatcher, Maureen (last name unknown).

In 2020, Dorch was promoted into her current role as lead operator manager, with a work schedule from 2 p.m. to 11 p.m. She is the only lead operator manager with supervisors reporting to her. Also, dispatchers report to Dorch if they cannot problem solve an issue regarding transportation operations.[6] Work issues or complaints from dispatchers that they cannot resolve are relayed to Dorch; and she discusses them with Millan who decides on the ultimate resolution.[7] As lead operator manager, Dorch oversees supervisors and dispatchers and is authorized to assign work to the supervisors, monitor routes, assist drivers in the field, and report trespassers on company premises to Millan. Prior to her elevation into the lead operator manager position, Dorch was an hourly employee. However, she is currently in a salaried position.

The Respondent has a "group of people" who are responsible for hiring employees. However, Millan has authority to hire and fire employees. Although Dorch is not authorized to hire or terminate workers, she can recommend to Millan that employees be disciplined or fired. She also can report to Millan employee violations, but he is the ultimate decisionmaker for disciplining or terminating employees. Anyone, including representatives from other

[6] Dorch does not handle customer complaints. The client services department addresses customer complaints. (Tr. 247.)

[7] Specifically, the drivers report problems on their route to the dispatchers who report to the "oversight person" on duty at the time which could be Millan, Cecilia, or Dorch. As previously noted, the dispatchers usually report problems they cannot handle to Dorch but if she is not present, Pino or Millan will address it.

municipalities, can recommend an employee's termination. Safety concerns are reported to Alvarez. The Respondent also employs a road supervisor for each city it manages and operates routes. The Respondent's dispatchers distribute the driving assignments and prepare and review the manifest that the drivers use to perform their work.

The 3737 facility began operating in about January 2018. The Respondent's 3737 facility employs drivers, dispatchers, and office and administration personnel.[8] There are approximately 200 to 300 employees working from the location with about 160 employees belonging to the bargaining unit. Currently there are nine dispatchers and 17 supervisors, including three lead supervisors. Supervisors and drivers are overseen by the lead supervisors; and approximately five to six supervisors are on duty for each shift.

The majority of bargaining unit members wear uniforms with LSF initials/logo on it. Office clerks or personnel wear red shirt with the company logo and the drivers wear the blue polo shirt with the company logo. The supervisors wear red shirts with their title written on it identifying them as supervisors.[9]

The majority of the employees in the bargaining unit work out of the 3737 facility. The dispatchers are split among three shifts: about 4 a.m., 12 p.m. or 2 p.m. The unit drivers have two shift changes at the facility with the first shift from 5 a.m. to 3 p.m. and the second shift from 3 p.m. to 11:30 p.m. There is one dispatcher on each shift distributing work assignments. The busiest parts of the day at the 3737 facility are from 4:15 a.m. to 8:30 a.m. and 1 p.m. to 2:30 or 3 p.m. Between 80 to 100 drivers each day leave from the facility to start their routes, including non-bargaining unit drivers. Drivers at the facility are either waiting to get an assignment from the dispatcher or returning from their route to turn in their paperwork. Drivers get about 45 minutes to prepare to go to their route after arriving at work and punching into the time clock.[10] When the drivers are ready to go to their route, a company vehicle transports them. While waiting for the company shuttle, drivers often congregate in the 3737 facility break room. The break room is also used by drivers at the end of their shifts.[11] All employees, including supervisors, have access to the break room. However, while on their route, drivers take their breaks at the end of the line.

As part of its contractual obligation, the Respondent has to ensure that the vehicles are secure and safe from terrorist attacks pursuant to the federal government Security and Safety

[8] The aforementioned individuals, including Dorch, comprise the management/supervisory team that also oversees the 3737 facility. (Tr. 154.)

[9] Dorch testified that she was not required to wear a uniform. (Tr. 238.) Millan testified that all drivers wear dark navy-blue shirts with the LSF logo on the shoulder and black or blue pants. Consequently, Millan insisted it is not possible to distinguish which municipality the driver works for or if the driver is in the bargaining unit based on their uniforms. (Tr. 317—321.) The union disputes this point. Although the parties assert that this is an important point because it shows whether Respondent's stated reason (security concerns) for requiring the Union to give advance notice before shop visit is valid, I disagree.

[10] Millan insists that drivers do not have time to socialize in the morning prior to starting their route. The union disagrees. I find that it is unnecessary for me to address this point in order to rule on the merits of the complaint's allegations.

[11] The union bulletin board is in the break room.

Policies and Procedures (SSPP). (R. Exh. 10.) Consequently, there are security measures implemented throughout the facility, including security cameras surveilling, among other areas, the entrances and trolley yard; a couple of "yard men" periodically patrolling the grounds; and there is a locked gate into the yard. The entire facility is surrounded by a concrete wall. 3737 facility is not open to the public; there is signage notifying people that the property is private/no trespassing; and there is no solicitation allowed on the property. (R. Exhs. 1, 2, 6, 9.) Currently there are about 100 to 175 trolleys and buses at the 3737 facility which are secured in the fenced-in gated yard with the keys in the ignition. (R. Exh. 1) There are 109 trolley car parking spaces. Approximately 10 to 15 municipalities that are not part of the bargaining unit also operate their vehicles from the 3737 facility. Prior to the COVID-19 pandemic, the trolleys operated 24 hours a day, 7 days a week. However, post-pandemic, the trolleys stop at midnight and are back in the facility between 12:30 a.m. to 1 p.m.

B. The Union and Bargaining Unit Members

On May 14, 2013, the union became the exclusive collective-bargaining representative of the bargaining unit. There are several municipal contracts that are part of the bargaining unit which is set forth in the CBA. At all material times, the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers employed by Respondent out of the following locatons: Miami, Coral Gables, Miami Lakes, Miami Springs, Doral, Homestead, Village of Pinecrest and Opa-Locka, Florida; excluding all other employees, office clerical employees, professional employees, dispatchers, mechanics, road supervisors, guards and supervisors as defined by the Act.

(GC Exhs. 1(j), 1(l), 1(m).)[12] The Union and Respondent have entered into successive CBAs, the most recent effective from November 25, 2019, to November 24, 2021. While the current CBA does not address shop visits or contain an access provision, there is a management-rights clause and a waiver provision which the parties claim supports their conflicting theories about the complaint. (R. Exh. 20 pgs. 14 – 15, 52.)

Beginning in about 2016, the union started representing the approximately 160 tram drivers out of the 3737 facility. Michael Cortez (Cortez) has been employed with the Teamsters Local 769 in Miami for about 6 years. From August 2017 to December 23, 2019, he was the business agent for the tram drivers. In his role as the business agent, Cortez is responsible for ensuring CBA compliance, negotiate contracts, grievance hearings, and engage unit members during shop visits. He reports to the executive board comprised of Principal Officer Josh Zivalich (Zivalich), Secretary Treasurer Rolando Pina (Pina), and Recording Secretary Steve Myers (Myers).

Daniel Vera (Vera) has been employed with 769 Local since March 1, 2019, as a business agent and union organizer. He negotiates contracts, monitor enforcement of the CBA,

[12] In its Answer to the complaint and notice of hearing, the Respondent states that it no longer operates in the cities of Coral Gables and Miami Lakes. (GC Exhs. 1(l)(m).)

organizes current and new members, recruits new members, and conducts monthly shop visits. Vera reports to the executive board. Since December 23, 2019, Vera has been representing the bargaining unit members at the 3737 location.

C. The Union's Shop Visit Practice

For each shop visit he conducted, Cortez would document it on the union's monthly expense/activity report and give the form to Pina for review to get reimbursed for his expenses. (Tr. 24-26.) Between August 2017 to late December 2019, Cortez identified the shop visits on his expense/activity reports as "LSF" or "LOSF"; and if the visit was for a purpose other than a shop visit, he would try to note it on the form. Id. After submitting his expense/activity reports for review, Cortez keeps a hard copy in his desk.

Between August 2017 to February 26, 2020, the Union, through Cortez or Vera, made about 23 shop visits to Respondent's facilities over a 2 ½ year period. Cortez made five visits in 2017; about six visits in 2018; and about nine visits in 2019. (Tr. 68, GC Exh. 3.) Cortez primarily conducted shop visits at the 3737 facility because he was told by the prior business agent that it was where he could meet the most drivers in one visit. Cortez would conduct shop visits at the 3737 location and meet with the drivers outside on the south side of the facility next to the dispatch window or inside the building in the employee break room.[13] During the afternoon around the shift change, Cortez would make a shop visit for about 30 to 40 minutes; He would enter the premises through the southside entrance of the building and also parked at the southside of the building near the entrance gate. While visiting the 3737 location, Cortez never saw a security guard at the entrance, but he did observe security cameras surrounding the facility. Cortez and Naiditch agree that they never had an in-person conversation about the 3737 facility being private property. Although Fraga was the terminal manager at 3737 for most of the time Cortez was the business manager for the facility, they never met. Moreover, there is no evidence that Fraga and Cortez ever interacted at any other point. In early 2019, Millan replaced Fraga as the general manager.

Cortez did not give Respondent advanced notice of his shop visits, except on November 30, 2017, December 4, 2017, May 3, 2018, and December 23, 2019. On those occasions he was either conducting shop visits while also attempting to meet with management about specific matters or he wanted to talk with management about a particular union concern. (Tr. 32–34, 36, 38; GC Exhs. 5, 6, 7, 8, 9.) On November 30, 2017, Cortez emailed Naiditch that he would be in the facility for a shop visit and wanted to introduce Naiditch to Pino.[14] Naiditch was unable to meet with them. (GC Exh. 4.) Likewise, on December 4, 2017, Cortez emailed Naiditch that he was going to make a shop visit the next day and would like to stop by Naiditch's office afterwards to speak with him. Naiditch responded that he was unsure of his availability but for Cortez to call when he was "in the area" to "doublecheck." (R. Exh. 24.) On December 5, 2017, Cortez called Naiditch's mobile to follow-up "to see if [Naiditch] was available to visit with [Cortez]" but assumed since he did not answer his phone, Naiditch was unavailable. (GC Exhs.

[13] The union maintained a locked bulletin board in the employee breakroom. He and the shop steward had keys to the bulletin board.

[14] Naiditch's office and the majority of his work is performed in Respondent's building at 2766 NW 62nd Street in Miami, FL.

5.) Cortez canceled the November 30, 2017, shop visit but conducted the December 4, 2017, visit despite Naiditch's unavailability. An April 11 and May 3, 2018 email from Cortez to Naiditch also showed him conducting shop visits without giving management prior notice. (GC Exhs. 6, 7.) In response to the May 3, 2018, Cortez sent him, Naiditch wrote in an email dated May 11, 2018, "please let me know in advance of any plans to go to [3737], as it's a private facility." (GC Exh. 8; R. Exh. 24.) Nonetheless, Cortez continued conducting shop visits without giving prior notice. The final documented visit Cortez made as business agent to the 3737 facility was on December 23, 2019. Without prior notice to management, Cortez and Vera visited the 3737 location to introduce Vera to Millan and notify him that Vera had replaced Cortez as the business agent. As a result of that visit, in an email dated February 12, to Cortez and Vera, Naiditch wrote, in part, that pursuant to a prior discussion with Cortez, Vera (or any union representative) cannot continue to visit the 3737 facility without advance notice to Respondent (R. Exhs. 4, 4a.) During the period that Millan's tenure as general manager and Cortez' time as business agent overlapped, they only met in-person on three occasions.

D. Shop Visits Leading to the February 26 Unfair Labor Practice Charge

As previously noted, on December 23, 2019, Cortez made an unscheduled shop visit to the 3737 facility with Vera. While at the location, Cortez went to Millan's office to tell him that his tenure as the business agent had ended that day, and Vera would be assuming the role. Short introductions were made, with Vera and Millan exchanging contact information. Thereafter, Vera made three shop visits to the 3737 location without giving prior notification. During his shop visits he would meet with unit members in the break room and, or outside near the dispatch window. The visits were primarily to introduce himself to the unit members and ask if they had any workplace issues to discuss.

On January 13, Vera conducted his first shop visit alone at the 3737 facility. He arrived about 5 a.m., parked in the company lot, and visited with the unit members for about 40 to 45 minutes while passing out his business cards. Vera also requested to see Millan but was told he does not come into the facility until later in the morning, so Vera asked to speak to the person in charge. Consequently, Vera spoke with Dorch briefly in her office where he introduced himself and told her that he would occasionally visit at 3737 facility to meet with the members. She did not comment on him not giving advance notice. On February 11, Vera again arrived at the 3737 facility at about 5 a.m. for a shop visit. He met for 40 to 45 minutes with unit members next to the break room and outside at the picnic tables. At some point in his visit, Vera also requested to speak with Dorch "to let her know I was conducting a visit." (Tr. 93 – 94.) She came to the door and greeted him; and Vera told her that he was conducting a shop visit, but she did not comment. The interaction lasted less than 2 minutes.

At some point prior to the February 26 shop visit, Millan had been told by the "night crew" that "a union rep" had been coming to the 3737 location when Millan was not at the facility and had not given him advance notice about the visits. Consequently, Millan told his staff "the only time the union rep is allowed on property is when they notify us." (Tr. 330.) Moreover, Millan told Naiditch to send the Union notification of the requirement to notify management in advance of visits; and he would "like to be here when they come." Id. On February 12, Naiditch sent an email addressed to Cortez and Vera which stated:

> Mike, I just left you a message. I don't recall [if I've] met Daniel at your office, but I was given a business card of his. Our staff report that he is giving out business cards during the day, and at night. As we've discussed before, our location is private property, and this cannot continue.

(R. Exh. 4; Tr. 95 – 96.) Cortez responded by telling Naiditch that he was no longer the business agent and to contact Vera directly. Id. Vera did not respond to the email because he felt that it was addressed to Cortez. Despite Naiditch's warning to them against making visits without prior notification to management, on February 26, Vera again visited 3737 without advanced notice resulting in the incident which is the subject of this complaint.[15]

On February 26, Vera made a shop visit in the early afternoon because he wanted to catch unit members working the morning and, or afternoon shifts. He met with members for about 1½ hours in the breakroom or outside at the picnic table in front of the dispatch window. While in the breakroom meeting with members, Millan entered and told him to leave because he was on private property, but Vera replied it is not private property so he would not leave. Vera also admits that he may have responded to Millan with a few profanities. As a result of Vera's refusal, Millan threatened to call the police if Vera did not leave, but Vera continued to refuse, insisting he had a right to be there. Milan called the police while Vera continued talking to unit members and handing out his business cards. Eventually, the police arrived and after speaking with Millan, told Vera to leave and that he would be arrested if he returned. Vera left the property. Approximately 20 employees observed the incident between Vera, Millan, and the police. The incident was documented in a police report, notice to "upper management," and notice to the Respondent's union liaison. (Tr. 336.)

As a result of being told to leave the 3737 location by Millan and the police, on February 26, Vera texted Dorch to ask why the incident occurred because he had not experienced any "issues" with previous shop visits to the facility. (Tr. 117; GC Exh. 12.) Dorch did not respond. Since the incident on February 26, Vera has not conducted a shop visit nor contacted management to do a visit because he claims not to trust management and, according to his understanding, the police threatened to arrest him if returns. (Tr. 131–132.) Vera insisted that between December 23, 2019 and February 26, he did not have "any problems" visiting unit members at 3737. Moreover, Vera denied that Cortez told him "[Cortez] had received prior emails from Naiditch indicating that prior notice was required, prior to making a shop visit[.]" (Tr. 141.)

Vera returned to the 3737 location on September 10, about 5 a.m. or 6 a.m. to place a union posting on the union's bulletin board located in the employee breakroom. When Vera arrived, he sent a text to Dorch to let her know that he was in the building. Drivers were present but he did not communicate with them nor meet with anyone. The visit lasted less than 5 minutes. After he left, Dorch, via text, responded good morning and he replied that he was sorry he missed her. There is no indication in the record that Vera has visited the 3737 facility since September 10.

[15] While Naiditch had emailed Cortez on May 11, 2018, instructing Cortez to notify him in "advance of any plans to go to the location as it's a private facility," Vera had not had a discussion with the Respondent up to that point about him giving the Respondent advance notice before his shop visits. (Tr. 32, 36–38, 295; GC Exhs. 4–9; R. Exh. 4, 24.)

III. Discussion

A. Dorch as Respondent's Agent pursuant to Section 2(13) of the Act

The General Counsel contends that Dorch is "without question an agent of Respondent" because at the time (1) she was a lead dispatcher and responsible for certain activities in Millan's and Victoria Pino's absences; (2) dispatchers escalated disputes to her attention; and (3) while on her shift, she was required to inform Millan of incidents at the 3737 location. (GC Br. 13.) Respondent denies that Dorch is an agent because (1) all incidents on her shift were reported to Millan who was the only person with decision-making authority at 3737; and (2) Dorch cannot take independent job action and has "no authority to alter the terms and conditions of the employment of the drivers." (R. Br. 7.)

Section 2(13) of the Act provides that an individual who is an agent of the employer is, in effect, the employer for purposes of assessing responsibility in matters over which the Board has jurisdiction. The Board applies common law principles of agency to determine whether individuals are agents when in the course of making particular statements or taking particular action. An individual may be deemed an agent based on either actual or apparent authority to act for the employer. *Hausner Hard-Chrome of Kentucky, Inc*., 326 NLRB 426, 428 (1998). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." *Southern Bag Corp*., 315 NLRB 725 (1994), and cases cited therein. The principal either intends to cause the third party to believe the agent is authorized to act for the principal or should realize that its conduct is likely to create such a belief. *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001). The Board's established test for determining whether an employee is an agent of the employer, under all the circumstances, is if "the employees would reasonably believe that the employee in question was reflecting the company policy and speaking and acting for management." *Einhorn Enterprises*, 279 NLRB 576 (1986), citing *Community Cash Stores*, 238 NLRB 265 (1978); *Waterbed World*, 286 NLRB 425, 426 (1987). Last, the General Counsel has the burden of establishing Dorch acted with apparent authority because the General Counsel is the party asserting such a relationship. See *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994).

The parties have focused on whether Dorch meets the definition of an agent under the apparent authority test. I find that she does not. While the evidence is undisputed that Dorch was a lead dispatcher during the period at issue, it is insufficient to support a finding that she is Respondent's agent. As a lead dispatcher, Dorch was an hourly employee with no independent authority to make decisions that affected drivers' pay, discipline, or other personnel matters. She did not have authority to hire dispatchers, transfer dispatchers, suspend dispatchers, lay off dispatchers, or recall dispatchers. Likewise, she could not discharge, assign, reward, discipline, schedule, assign overtime, or evaluate the work performance of the dispatchers. These restrictions on her authority also applied to the drivers. When dispatchers complained to her about work issues, Dorch would take them to Millan for him to decide on a resolution. Admittedly, she could give Millan her input on how to resolve a particular issue, whether a candidate for employment as a dispatcher would be a good hire, whether to suspend or what type

of work to assign employees, look over the scheduling to make sure there was sufficient coverage, and grant time-off. The General Counsel did not present any persuasive evidence that Dorch could or did make these or other managerial decisions without first consulting and getting approval from Millan. The evidence clearly establishes that Millan was and is the ultimate decisionmaker for the 3737 location. (Tr. 243 – 245, 251–259, 266–269.) Moreover, there is also no testimony from dispatchers, drivers, or other employees that they reasonably believed Dorch, in her actions, reflected company policy or was authorized to oversee the facility's operations and resolve all employee concerns independent of Millan's authority.

I find, therefore, that the evidence does not establish that Dorch meets the definition of an agent as set forth in Section 2(13) of the Act.

B. Respondent Did Not Violate Section 8(a)(1) and (5) of the Act

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (5) of the Act when since on or about February 26: (1) Respondent changed the established past practice between Respondent and the Union by requiring union representatives to provide advance notice to Respondent before visiting Respondent's 3737 NW 43rd Street facility for the purpose of administering the collective-bargaining agreement between Respondent and the Union; and (2) Respondent denied a union representative access, including by calling police officers to its 3737 NW 43rd Street facility to force the union representative to leave its premises. The General Counsel argues that Respondent's actions violate the Act because (1) from August 2017 to February 11, there was a past practice of allowing union shop visits without advance notice to management; (2) despite Respondent asking Cortez for prior notice via a May 11, 2018 email, Cortez continued to conduct unannounced shop visits without incident which shows the Respondent knew of and acquiesced to the past practice; and (3) until February 26, Vera also continued the past practice without incident.

Respondent counters that the past and current CBAs do not contain access clauses and there was no past practice of allowing the union access to its property without providing prior notice as shown by: (1) evidence Respondent was unaware of Cortez' visits to the "old" location in 2017; (2) a December 4, 2017, email from Cortez to Respondent giving advanced notice of his visit to the facility; (3) no evidence that Respondent was aware of Cortez' shop visits except in those instances when Cortez notified management of his visits; (4) an email Naiditch, sent Cortez dated May 11, 2018, again telling him to provide advance notice of shop visits to the facility; (5) when notified in 2017 and 2018 by Respondent that prior notice was required for shop visits, the Union did not object, request to bargain over it, or file an unfair labor practice (ULP) charge, thus waiving its right to bargain over the change; and (6) the Union conducted no shop visits from June 2018 to February 2019, thereby, weakening "any argument that these shop visits both occurred repeatedly and in a clear and consistent manner." (R. Br. 16.)

An employer may not unilaterally change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). "Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning

the contemplated changes." *Lawrence Livermore National Security*, *LLC*, 357 NLRB 203, 205 (2011). The duty to bargain, however, only arises if the changes are "material, substantial and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp*., 334 NLRB 165, 171 (2001). In order to find that an employer made unilateral changes to an employee benefit in violation of the Act, it must be shown that (1) material changes were made to the employees' terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to notify the union of the proposed changes; and (4) the union did not have an opportunity to bargain with respect to the changes. *San Juan Teachers Assn*., 355 NLRB 172, 175 (2010); *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011).

Requiring the Union to provide advance notice before conducting shop visits is, if proven, a material change to unit members' terms and conditions of employment. *Ernst Home Centers*, 308 NLRB 848–849, 865 (1992) (unilateral change in the Union's access to employees a material change that obligates the employer to bargain). The Board has consistently held that a union's right of access to carry out its representational duties is a mandatory subject of bargaining. *McGraw-Hill Broadcasting Co.*, 355 NLRB 1283, 1294 (2010) (right of access to represent employees is a mandatory subject of bargaining); *Regency Heritage Nursing & Rehabilitation Center*, 353 NLRB 1027, 1034 (2009) ("[u]nion visitation is a mandatory subject of bargaining"). The parties agree that the CBA does not contain an access provision. The Union admits and there is no evidence that the Union filed a grievance over the Respondent's email demands that it provide notice prior to conducting shop visits nor requested to bargain for an access provision in the CBA. Therefore, the question is whether the parties had a past practice of allowing the Union to conduct unannounced shop visits which the Respondent unilaterally changed. *Linwood Care Center*, 367 NLRB No. 14 (2018), citing *Ernst Home Centers*, 308 NLRB 848 (1992) ("when an employer and a union have an agreement allowing the union access to its property to carry out its representational activities, of the employer has an established past practice of allowing access, the employer cannot unilaterally alter that agreement or practice.") The party alleging a past practice exists has the burden of proving that the practice "occurred with such regularity and frequency that employees could reasonable expect the practice to reoccur on a consistent basis." *Mike-Sell's Potato Chip Co*., 368 NLRB No. 145 slip op. at 4 (2019); S*unoco, Inc.,* 349 NLRB 240, 244 (2007). The burden is on the General Counsel to prove Respondent had knowledge of the past practice. See *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014); *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1338–1339 (4th Cir. 1976); *Southern Bakeries, LLC v. National Labor Relations Board*, 871 F.3d 811, 826 (8th Cir. 2017).

It is undisputed that there was a past practice of union access to Respondent's facility, specifically the 3737 location. However, the parties do not agree that there was a past practice of allowing shop visits without the Union giving Respondent advanced notice. The Union argues there was a past practice allowing it to make shop visits unannounced. Respondent, however, counters that the Union has always been required to give management advanced notice of shop visits and any unannounced visits were conducted without Respondent's knowledge. Based on the record of evidence, I find that the General Counsel has failed to establish its burden of proof because (1) the record does not show the practice occurred with the requisite regularity and frequency; and (2) the evidence does not persuasively establish that Respondent had knowledge of the Union's unannounced shop visits.

Although Cortez conducted some shop visits at the "old" property in 2017, he primarily made shop visits at the 3737 location when it became operational in early 2018. Cortez conducted a total of about fifteen (15) shop visits between August 2017 and December 23, 2019. Vera visited the 3737 facility on only four occasions. From May 13, 2013, when the union became the exclusive collective-bargaining representative of the unit, until August 2017, there is no evidence of shop visits to the facility that was ultimately replaced by 3737. After Cortez became the business agent in August 2017 and until Vera took over on December 23, 2019, Cortez conducted a total of about 15 shop visits to the 3737 facility. In 2017, Cortez made five shop visits and six shop visits in 2018. (GC Exh. 3; Tr. 67—68.) There were no documented shop visits between June 21, 2018, and February 2019. Cortez gave undisputed testimony that he made nine shop visits in 2019 but only seven visits for the bargaining unit at issue are documented on his expense/activity report. (GC Exh. 3.) The evidence is undisputed that Vera conducted three shop visits in 2020. I find that although the practice crossed over two successive CBAs, it was not for a reasonably long time. Since August 2017, there is only documented evidence of about eighteen shop visits covering the old and new (3737) locations. (GC Exh. 3.) *Atlanticare Management, LLC*, 369 NLRB No. 28 (2020) (past practice established because the employer had annually given merit increases, without a break in the practice, since it purchased the company); *United Rentals, Inc*., 349 NLRB 853, 854 (2007) (past practice established because the employer for at least 4 years, used the same tools to calculate merit increases, the same criteria on which the calculations were based and the same timetable for providing the merit increases).

The evidence established that Cortez gave Respondent advanced notice of his shop visits on November 30, 2017, December 5, 2017, May 3, 2018, and December 23, 2019. According to Cortez, he contacted management on those dates because he wanted to combine a shop visit and a meeting with management to address specific workplace issues. On November 30, 2017, Cortez emailed Naiditch to inform him in advance that he was going to conduct a shop visit that day and also wanted to arrange an introductory meeting between Naiditch and Pina while at the facility. However, Naiditch responded that he was unavailable and would have to meet with them on another date. Naiditch does not maintain an office at the 3737 location but rather works primarily from the Respondent's 2766 NW 62nd Street facility in Miami, Florida. Ultimately, Cortez did not perform the shop visit on November 30, 2017. Likewise, on December 5, 2017, Cortez emailed Naiditch that he had called his mobile "to see if [Naiditch] was available to visit with [Cortez]" but assumed since he did not answer his phone, he was unavailable. There is no evidence that Cortez postponed the December 5, 2017 shop visit because of Naiditch's unavailability. Therefore, it can be argued that Cortez conducted at least one unannounced shop visit in 2017 with Respondent's knowledge and without objection from Respondent. However, in 2018, Respondent made clear to Cortez that he should notify management in advance of the visits. In an email to Naiditch dated May 3, 2018, Cortez told Naiditch about a problem he discovered with certain employee equipment during his shop visit that day. (GC Exh. 4, 5, 6, 7.) In response to the May 3, 2018, from Cortez, Naiditch wrote in an email dated May 11, 2018, "please let me know in advance of any plans to go to [3737], as it's a private facility." (GC Exh. 8.) Nonetheless, Cortez continued conducting shop visits without giving prior notice. As previously noted, on December 23, 2019, Cortez and Vera made an unscheduled visit to 3737 to introduce Vera to Millan and notify him that Vera had replaced Cortez as the business agent. As a result of that visit, in an email dated February 12 to Cortez and Vera, Naiditch wrote, in part,

that pursuant to a prior discussion with Cortez, Vera (or any union representative) cannot continue to visit the 3737 facility without advance notice to Respondent. (R. Exhs. 4, 4a.)

Except for above-mentioned instances, there is no evidence that Respondent was aware of the other shop visits made by Cortez or Vera. I find that the evidence is clear neither Fraga or Naiditch would have been aware of Cortez' shop visits regardless of the time of day he made them because Cortez admits that he never met Fraga and did not meet with Naiditch at the 3737 facility (Tr. 59.) Moreover, the wording of Cortez' November 30, 2017 email to Naiditch could easily be interpreted as Cortez informing him in advance of a shop visit during which he would like to introduce Naiditch to another union representative. Also, there is no admission by Naiditch or Fraga or any other evidence that they were aware of Cortez' or Vera's visits to the facility except for the above-mentioned dates. Likewise, Cortez admits he only met with Millan two or three times with the first meeting a simple meet and greet, a second time in March 2019 to discuss the termination of an employee, and a third time to introduce Vera to Milan. (Tr. 44.) These do not constitute shop visits but rather meetings set up to discuss specific workplace situations.

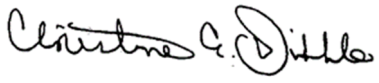
Vera had even less contact with management at 3737 location because of how little time he had been the business agent. Except for December 23, 2019, and February, there is no evidence that Respondent knew he was at 3737 making shop visits. On December 23, 2019, Vera briefly met Millan for the first time at the 3737 facility. During his shop visit to 3737 on January 13, at 5 a.m., Vera asked to speak with Milan, but he was not there so he briefly met Dorch to introduce himself. She did not comment on him making a shop visit without advance notice to Respondent; and there is also no evidence that anyone made Millan aware of the visit. Vera visited the 3737 location for a third time on February 11. He again arrived at the facility about 5 a.m. to conduct a shop visit and at some point, he asked to see Dorch and informed her he was doing a visit. She voiced no objections nor issued him a warning not to conduct unannounced visits. After the February 11 shop visit, however, Cortez and Vera received an email from Naiditch stating shop visits without prior notification to Respondent had to cease. (Tr. 95–96; R. Exh. 4.) It is clear from his email that Naiditch was unaware of the shop visit until he was told about it by an employee and on learning of the visit again demanded the Union give advance notice of the visits. Despite Naiditch's warning, on February 26, Vera again visited 3737 without prior notice to management resulting in the incident which is the subject of this complaint.

Respondent is correct in noting that there is an overwhelming lack of evidence that it was aware of the Union's continued shop visits without Respondent's knowledge. The evidence shows that there were limited instances of Respondent being aware of Cortez and, or Vera conducting shop visits at 3737 without giving prior notice. For each of those times, management would tell the Union that its representatives are required to notify Respondent before making shop visits. Since I have determined that Dorch is not any agent within the meaning of the Act, the number of times Dorch may have been aware of Cortez' and Vera's unscheduled shop visits is irrelevant to whether the Respondent was aware of this practice unless it is established that she informed management who took no action. There is no such evidence. Even assuming that Dorch is an agent of Respondent and was aware of the shop visits, this does not overcome the lack of evidence that the shop visits occurred repeatedly over a "reasonably" long time.

Moreover, Respondent did not preclude the Union from continuing to conduct shop visits either on or after February 26. In fact, Vera was meeting with bargaining unit members for about 1½ hours prior to the arrival of the police. Based on his testimony, he was able to spend more time meeting with unit members on February 26, than on his previous three shop visits at the 3737 facility. Moreover, the evidence established that Vera voluntarily "made no attempt" to conduct any shop visits after the February 26, incident because of his belief he might be arrested and distrust of management.

Based on the evidence, I find that the General Counsel has failed to prove that Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to bargain collectively and in good faith with Respondent over whether the Union is required to give advance notice before conducting shop visits at Respondent's facility; and denied a union representative access to its 3737 facility. Accordingly, I recommend dismissal of the complaint.

Dated: Washington, D.C. September 17, 2021



Christine E. Dibble (CED)
Administrative Law Judge